APPENDIX.

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 141, *et seq.*, Supp. 1949), are as follows:

"Sec. 101. The National Labor Relations Act is hereby amended to read as follows: * * *

"Sec. 8. * * *

* * * * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agent— * * *

* * * * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: * * *

* * * * * * * * *

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. * * *

* * * * * * * * *

"(c) The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be

evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICE.

* * * * * * * * *

"Sec. 10(k). Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B) or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair

labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: PROVIDED FURTHER, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: PROVIDED FURTHER, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situation where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

EXCERPTS FROM NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS SERIES 6.

* * * * * * * * *

"Sec. 102.74 (203.74) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of Section 8 (b), the Regional Director shall investigate such charge, giving it priority over all other cases in the office except cases under paragraph (4) (A), (4) (B), and (4) (C) of Section 8 (b) and other cases under paragraph (4) (D) of Section 8 (b). If it appears to the Regional Director that further proceedings should be instituted, he shall cause to be served on all parties to the dispute out of which such unfair labor practice may have arisen a notice of the filing of said charge together with a notice of hearing before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the Notice of Hearing. . . .

"Sec. 102.75. If, within 10 days after service of the Notice of Hearing the parties submit to the Regional Director satisfactory evidence that they have adjusted or agreed upon methods of voluntary adjustment of the dispute, the Regional Director *shall* withdraw the Notice of Hearing and *shall* dismiss the charge. . . . (Emphasis supplied.)

"Sec. 102.76. Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument or the submission of briefs . . . to certify the labor organization or the particular trade, craft, or class or employees, as the case may be, which shall perform the particular work tasks in issue or to make other disposition of the matter. . . .

"Sec. 102.77. If, after issuance of certification by the Board, the parties submit to the Regional Director satisfactory evidence that they have complied with certification, the Regional Director *shall* dismiss the charge. . . . (Emphasis supplied.)"

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 31

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, AND ITS AGENT, LLOYD A. MASHBURN; MILLWRIGHTS AND MACHINERY ERECTORS, LOCAL 1607, OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., AND ITS AGENT, HERMAN BARBAGLIA, PETITIONERS

v.

HOWARD F. LEBARON, REGIONAL DIRECTOR OF THE TWENTY-FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 265-266) is reported at 185 F. 2d 405. The opinion of the United States District Court for the Southern District of California (R. 83-104) is reported at 84 F. Supp. 629.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1950 (R. 267). A petition for rehearing was denied on January 5, 1951 (R. 268). The petition for a writ of certiorari was filed on April 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in the Appendix to the Petition.

QUESTIONS PRESENTED

The injunction having expired, this case is now moot. The questions raised by petitioners are:

1. Whether Section 8 (b) (4) (D) of the Labor-Management Relations Act of 1947, on its face, or when construed to prohibit strike action of the kind enjoined by the courts below in this case, impairs rights guaranteed by the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

2. Whether the injunction against strike action sustained by the court below infringes rights protected by Section 8 (c) of the Act.

3. Whether the district court could properly entertain a petition for interlocutory injunctive relief under Section 10 (l) of the Act prior to the expiration of the 10-day period allotted by the Board in the decision under Section 10 (k) for

voluntary compliance by the parties with the Board's resolution of the jurisdictional dispute.[1]

STATEMENT

On May 3, 1949, Howard F. LeBaron, Regional Director of the Twenty-first Region of the National Labor Relations Board, herein called the Regional Director, acting on behalf of the Board, filed a petition for injunctive relief against petitioners in the United States District Court for the Southern District of California. The petition, which was filed pursuant to the provisions of Section 10 (l) of the Act, set forth that Local Lodge 1235 of the International Association of Machinists, herein called Machinists, had on February 2, 1949, filed charges, and thereafter on March 8, 1949, and April 15, 1949, filed amended charges with the Board alleging that petitioners had engaged in unfair labor practices in violation of Section 8 (b) (4) (D) of the Act. These charges alleged that petitioners had engaged in and were engaging in strike action with an object of forcing or requiring Westinghouse

[1] Petitioners assert (Pet. 9-10), without supporting argument, that the court below erred in holding that the evidence before the district court established probable cause to believe that petitioners had violated Section 8 (b) (4) (D) of the Act and further erred in holding that the injunction was properly limited to *pendente lite* relief "because that injunction determined finally the issue presented by the charge against petitioners and grants full and final relief against them." Petitioners do not even assert, however, that these alleged errors present questions warranting review by this Court. Cf. *Herzog v. Parsons*, 181 F. 2d 781, 786 (C. A. D. C.), certiorari denied, 340 U. S. 810.

Electric Corporation and Stone and Webster Engineering Corporation to assign to members of petitioner Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, a labor organization affiliated with the American Federation of Labor and herein called Millwrights, work which had been assigned to members of Machinists, then an unaffiliated labor organization, and that the strike action was affecting commerce within the meaning of Section 2 (6) and (7) of the Act. The petition further alleged that the charge and amended charges were referred to the Regional Director for investigation, and that, after a preliminary investigation, the Regional Director had reasonable cause to believe that the second amended charge was true and that a Board complaint should issue thereon (R. 2-11). The petition prayed for an injunction enjoining the alleged unfair labor practice pending its final adjudication by the Board (R. 11-13). Petitioners answered denying the jurisdiction of the Board and the court over the dispute, or the commission of an unfair labor practice within the meaning of Section 8 (b) (4) (D) of the Act, and claiming that Section 8(b)(4)(D), in any event, violates the First, Fifth and Thirteenth Amendments to the Constitution of the United States (R. 39-50).

On May 11, 1949, the Board issued its decision and determination of dispute under Section 10 (k)

of the Act (R. 229-242), in which it held that petitioners were not lawfully entitled to force or require Westinghouse Electric Corporation to assign the claimed work to members of Millwrights rather than to employees of the company who were members of Machinists.

On May 16, 1949, the district court held a hearing on the petition and, on May 26, 1949, issued its decision (R. 83-104). The evidence before the district court, which was substantially uncontradicted, established reasonable cause to believe that:

In July 1946, Southern California Edison Company, herein called Edison, a public utility company engaged in furnishing electrical energy and services to customers in the Los Angeles and Southern California area, began the construction of a new steam turbine electric power generating station at Redondo Beach, California, herein called the Redondo station (R. 27, 233-234). Stone and Webster Engineering Corporation, an interstate industrial construction firm, was the general contractor (*ibid.*). Sometime prior to January 1949, Edison contracted with Westinghouse Electric Corporation, an interstate manufacturer of electrical supplies and equipment, to furnish and install three steam turbine generators at the Redondo station (R. 29-30, 234). Westinghouse and General Electric Company, the other manufacturer under contract to furnish and install steam turbine generators at the Redondo station, in their installa-

tion work employed, among others, members of Machinists, an unaffiliated union (R. 126-130, 137-138, 155-157, 164-169, 183-185, 196-197, 234-235). All the rest of the approximately 650 employees engaged on the Redondo station project were members of unions affiliated with the American Federation of Labor and with petitioner Los Angeles Building and Construction Trades Council, herein called Council (R. 27-28, 234-237).

On January 31, 1949, Westinghouse began the installation of its second generator at the Redondo station (R. 193). Two members of Machinists, among others, were employed in the installation work (R. 166, 185, 235). At the commencement of work on the second generator, petitioner Barbaglia, a representative of petitioner Millwrights, and petitioner Mashburn, secretary-treasurer of petitioner Council, warned Westinghouse that petitioners would "take job action" unless the members of Machinists were replaced with members of Millwrights (R. 35, 160-163, 206-208, 213).

On February 2, 1949, petitioners called a strike among all their members and affiliates employed on the Redondo station project to compel Stone and Webster and Westinghouse to reassign to members of Millwrights the generator installation work being done by the two members of Machinists (R. 32-33, 35-36, 45, 86, 117, 162, 195, 235). All of the approximately 650 employees except the two Machinists' members employed by Westinghouse, walked

off the job and, except for that of the latter, all work was suspended on the project (R. 36, 195, 235). The strike continued until February 10, 1949, when Westinghouse, at the request of Edison, suspended its installation work and removed the two Machinists' members from the job (R. 34, 235).

On April 11, 1949, for the purpose of exerting further pressure on Westinghouse to assign its generator installation work to members of Millwrights, petitioner Council pulled the six riggers employed by Westinghouse to unload its third generator for the Redondo station off the job (R. 47, 30-32, 86, 117).

The district court found that there was reasonable cause to believe that petitioners had engaged in an unfair labor practice, within the meaning of Section 8(b)(4)(D) of the Act, affecting commerce within the meaning of Section 2 (6) and (7) of the Act (R. 96-97, 112-119). The court also concluded that Section 8(b)(4)(D) was not repugnant to the First, Fifth, or Thirteenth Amendment to the Constitution of the United States (R. 89-91, 119), and that injunctive relief pursuant to Section 10 (1) of the Act was appropriate (R. 91-100, 119-120). The district court thereupon granted the relief requested by the Board and enjoined petitioners, pending the final adjudication of the alleged unfair labor practices by the Board, from engaging in further strike action at the Redondo station to compel the assignment of Westinghouse's

installation work to members of petitioner Millwright rather than to members of Machinists or members of any other union (R. 121-123).

On July 8, 1949, petitioners filed their notice of appeal to the Court of Appeals for the Ninth Circuit from the injunction of the district court (R. 123-124). On December 8, 1950, the court below, sitting *en banc*, entered its *per curiam* decision and decree affirming the order of the district court (R. 265-267). On January 5, 1951, the court below denied petitioners' request for rehearing.

Meanwhile, on May 24, 1949, the Regional Director, on behalf of the General Counsel, initiated proceedings before the Board under Section 10 (b) of the Act by issuing a complaint against petitioners based on the Machinists' second amended charge. These proceedings, known upon the records of the Board as Case No. 21-CD-19, culminated in the issuance on May 11, 1951, of the Board's final decision and order dismissing the complaint on the ground that it had not been shown that petitioners here had failed to comply with the Board's prior resolution of the jurisdictional dispute. *Los Angeles Building and Construction Trades Council, A.F.L., and Lloyd A. Mashburn, its Agent; Millwright and Machinery Erectors Local 1607 of the United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman F. Barbaglia, its Agent and International Association of Machinists, for its Local Lodge 1235*, 94 NLRB No. 63.

ARGUMENT

This Court's decisions in the Secondary Boycott cases, decided June 4, 1951, have foreclosed many of petitioners' contentions. But, in any event, it is unnecessary to consider the merits of the contentions in this case, inasmuch as the injunction, which was affirmed by the court below, has now expired. The injunction, using the language of Section 10 (l) of the Act, provided that the Unions and their agents should be "restrained and enjoined pending the final adjudication by the National Labor Relations Board of the matters" involved in the unfair labor practice charge (R. 122). The Board's final adjudication in respect to the charge herein was issued on May 11, 1951 (*supra*, p. 8).

The Act empowers the Board, upon the filing of appropriate charges, to issue, hear and determine complaints that employers or labor organizations have engaged in unfair labor practices within the meaning of the Act (Section 10 (a), (b) and (c) of the Act). In addition, in respect to charges under Section 8 (b) (4) (D) of the Act, the unfair labor practice section involved here, the Board is empowered and directed in Section 10 (k) of the Act to hear and determine the dispute out of which the unfair labor practice arose.

Proceedings of this character are necessarily protracted and time-consuming. Congress believed that certain unfair labor practices committed by labor organizations, particularly those

prohibited by Section 8 (b) (4) of the Act, gave, or tended to give, rise to such serious and unjustifiable interruptions to commerce that their continuation, pending adjudication by the Board, would result in irreparable injury to the purposes of the Act.[2] To prevent this, Congress, in Section 10 (l) of the Act, empowered the district courts, upon finding reasonable probability that violations of Section 8 (b) (4) are occurring, to grant just and proper injunctive relief. The court is not called upon in a Section 10 (l) proceeding to decide whether in fact the charges are true or whether in fact a violation of the Act affecting commerce has been committed. That determination is reserved exclusively to the Board, subject to review by the courts of appeals pursuant to Section 10 (e) and (f) of the Act.[3] The injunctive relief contemplated in Section 10 (l) is thus entirely interlocutory and, as in the case of traditional equity practice with respect to interlocutory relief,[4] the prerequi-

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[2] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 27.

[3] *National Labor Relations Board* v. *Denver Bldg. Trades Council*, No. 393, this Term, decided June 4, 1951; *Douds* v. *Local 1250, Retail Wholesale Dept. Store Union*, 170 F. 2d 695 (C. A. 2); *Shore* v. *Building & Construction Trades Council*, 173 F. 2d 678 (C. A. 3); *Printing Specialties & Paper Converters Union, Local 388, A.F.L.* v. *LeBaron*, 171 F. 2d 331 (C. A. 9); *United Brotherhood of Carpenters & Joiners of America* v. *Sperry*, 170 F. 2d 863 (C. A. 10); *Douds* v. *Wine, Liquor & Distillery Wkrs. Union, Local No. 1*, 75 F. Supp. 447 (S.D.N.Y.).

[4] *Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F. 2d 42, 45 (C. A. 4); *Bowles* v. *Montgomery Ward & Co.*, 143 F. 2d 38, 42 (C. A. 7); *Northwestern Stevedoring Co.* v. *Marshall*, 41 F. 2d 28, 29 (C. A. 9).

site to the granting of such relief is a finding by the district court only that there is reasonable cause to believe that a violation of the Act, as charged, has been committed and that equitable relief would be "just and proper."

In this statutory scheme, the injunctive relief provided by Section 10 (l), is limited to such time as may expire before the Board issues its final order with respect to the unfair labor practices charged, or, as the statute itself provides, "pending the final adjudication of the Board with respect to such matter."

The Board has now made its final adjudication with respect to the unfair labor practices charged against petitioners. Accordingly, the injunction issued by the district court pending the final adjudication of the Board with respect to those charges, has, pursuant to the limitation contained in its own terms and the provisions of Section 10 (l), expired and is no longer operative.[5] It follows that the injunction proceedings are now moot, and no further judicial action is appropriate or necessary.[6] The petition for a writ of certiorari should

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[5] See *Ex parte Railway Co.*, 101 U. S. 711, 719; *Houghton* v. *Meyer*, 208 U. S. 149, 156-157; *Sweeney* v. *Hanley*, 126 Fed. 97, 99 (C. A. 9), certiorari denied, 193 U. S. 671; *Ft. Worth Street Ry. Co.* v. *Rosedale Street Ry. Co.*, 68 Tex. 163, 168 (1887), 7 S. W. 381; 28 Amer. Juris., *Injunctions*, § 314.

[6] See *Brownlow* v. *Schwartz*, 261 U. S. 216.

therefore be denied, or the judgment below ordered vacated on grounds of mootness.

Respectfully submitted,

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JUNE, 1951.

End

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